Ham Ho Seng & Anor v Aik-Aik Holdings Sdn Bhd & Anor and another suit

HIGH COURT (IPOH) — CIVIL SUITS NO 22-261 OF 1992 AND CIVIL SUITE NO 22-10 OF 1993
CLEMENT SKINNER JC
12 OCTOBER 1999

Companies and Corporations — *Winding up — Suit against company — Suit filed before company was wound up — Leave to sue company in liquidation — Whether leave had to be obtained from court which granted winding up order or court hearing suit — Companies Act 1965 s 226(3)*

The plaintiffs entered into a sale and purchase agreement with the first defendant on 20 October 1987 to sell a shoplot to them. The plaintiffs alleged that the first defendant was in breach of the sale and purchase agreement and had not delivered vacant possession and commenced this suit on 30 November 1992. After the commencement of the suit, the first defendant was ordered to be wound-up on 26 September 1996. In compliance with s 226(3) of the Companies Act 1965 ('the Act'), the plaintiffs made this application for leave to proceed in their action against the first defendant.

The issue was whether the application for leave could be made in any High Court including the court in which the suit was pending or whether it ought to be made to the court that granted the winding-up order. The plaintiffs had earlier made a similar application before the learned judge of High Court No 1, Ipoh on 14 December 1998 when the learned judge made no order on the application on the ground that the application for leave ought to be made to the court that made the winding-up order. Counsel for the plaintiffs instead filed a fresh application to this court and argued that such an application may be made because the suit was already pending here and eventually if leave was granted, the suit would be heard in this court. It was submitted that the plaintiffs were not interested in the winding-up proceedings and wish to proceed against the first defendant in this court to pursue their claims in civil proceedings. It was also argued that there was no distinction between the court that granted the winding-up order and any other High Court as they both enjoy co-ordinate jurisdiction.

Held, making no order as the application should be made to the court that granted the winding up order:

(1) The plaintiffs had already made an application before High Court No 1, Ipoh, for such an order and a decision had been made thereon by the learned judge; if the plaintiffs were dissatisfied with that decision, an appeal should have been lodged. Not having done so, it was not open to the plaintiffs to make a similar application before this court (see p 64B–C).

(2) Rule 163 of the Companies (Winding-up) Rules 1972 empowered the judge who granted the winding-up order 'to order the transfer to him of any action, cause or matter pending brought or continued by or against the company'. Thus, if the judge should see fit to exercise the powers vested in him, this suit will not be heard in this court as contended for by counsel (see p 64C–D). The provisions of s 226(3) of the Act should be read together with other provisions of law relevant to the winding-up of a company and for the judge who ordered the winding-up to effectively exercise the authority vested in him, if he so wishes, he must in the first place be made aware of the existence of such suits and it is by an application for leave under s 226(3) being made to the judge who ordered the winding-up that the relevant provisions of law are given effect to (see p 64D–F)

[Bahasa Malaysia summary

Plaintif-plaintif telah memasuki satu perjanjian jual beli dengan defendan pertama pada 20 Oktober 1987 untuk menjual sebuah rumah kedai kepada mereka. Plaintif-plaintif telah mendakwa bahawa defendan pertama telah melanggar perjanjian jual beli tersebut dan tidak menyerahkan milikan kosong dan memulakan guaman ini pada 30 November 1992. Setelah guaman ini bermula, defendan pertama telah diarahkan untuk penggulungan pada 26 September 1996. Dengan pematuhan s 226(3) Akta Syarikat 1965 ('Akta tersebut'), plaintif-plaintif telah membuat permohonan untuk kebenaran bagi meneruskan tindakan mereka terhadap defendan pertama.

Persoalannya adalah sama ada permohonan kebenaran tersebut boleh dibuat di mana-mana Mahkamah Tinggi termasuk mahkamah tersebut di mana guaman tersebut belum selesai atau sama ada ia sepatutnya dibuat ke mahkamah yang telah memberikan perintah penggulungan tersebut. Plaintif-plaintif telah terlebih dahulu membuat satu permohonan yang serupa di hadapan hakim Mahkamah Tinggi No 1, Ipoh pada 14 Disember 1998 apabila hakim yang arif tidak membuat perintah pada permohonan tersebut atas alasan bahawa permohonan untuk kebenaran tersebut sepatutnya dibuat kepada mahkamah yang membuat perintah penggulungan tersebut. Peguam bagi pihak plaintif-plaintif sebaliknya telah memfailkan satu permohonan baru ke mahkamah ini dan menghujahkan bahawa permohonan sebegini mungkin boleh dibuat kerana guaman tersebut masih belum selesai di sini dan lambat-laun jika kebenaran diberikan, guaman tersebut akan didengari di mahkamah ini. Adalah dihujahkan bahawa plaintif-plaintif tidak berminat di dalam prosiding penggulungan dan berhasrat untuk meneruskan terhadap defendan pertama di dalam mahkamah ini tuntutan-tuntutan mereka di dalam prosiding sivil. Adalah juga dihujahkan bahawa tiada perbezaan antara mahkamah yang telah

memberikan perintah penggulungan tersebut dengan mana-mana Mahkamah Tinggi kerana semuanya mempunyai bidang kuasa yang setara.

Diputuskan, tidak membuat sebarang perintah memandangkan permohonan sepatutnya dibuat kepada mahkamah yang memberikan perintah penggulungan:

(1) Plaintif-plaintif telah pun membuat satu permohonan di hadapan Mahkamah Tinggi No 1, Ipoh, kerana satu perintah dan keputusan telah pun dibuat oleh hakim yang arif; jika plaintif tidak berpuas hati dengan keputusan tersebut, satu rayuan patut dikemukakan. Dengan tidak berbuat sedemikian, adalah tidak terbuka kepada plaintif-plaintif untuk membuat satu permohonan yang serupa di hadapan mahkamah ini (lihat ms 64B–C).

(2) Kaedah 163 kepada Kaedah-Kaedah Syarikat (Penggulungan) 1972 memberikan kuasa kepada hakim yang memberikan perintah penggulungan 'untuk memerintah pemindahan tersebut kepada beliau tentang apa-apa tindakan, sebab atau perkara yang belum selesai yang dibawa atau disambung oleh atau terhadap syarikat tersebut'. Oleh demikian, jika hakim tersebut berfikiran adalah wajar untuk menggunakan kuasa yang diberikan kepada beliau, guaman ini tidak akan didengari di dalam mahkamh ini sebagaimana yang ditegaskan oleh peguam (lihat ms 64C–D). Peruntukan-peruntukan s 226(3) Akta tersebut hendaklah dibaca bersama dengan peruntukan-peruntukan undang-undang lain yang relevan kepada penggulungan sesebuah syarikat dan bagi hakim yang memerintahkan penggulungan tersebut di dalam menggunakan kuasa yang diberikan kepadanya dengan berkesan, jika beliau berhasrat sedemikian, beliau mestilah pertama sekali mempunyai kesedaran tentang kewujudan guaman sebegini dan adalah melalui permohonan untuk kebenaran di bawah s 226(3) yang dibuat kepada hakim yang memerintahkan penggulungan tersebut yang akan memberikan kesan kepada peruntukan-peruntukan relevan di sisi undang-undang (lihat ms 64D–F).]

Notes

For cases on suit against company wound up, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 907–910.

Legislation referred to

Companies Act 1965 s 226(3)
Companies (Winding-up) Rules 1972 r 163

Chai Kai Wooi (*Chai & Partners*) for the plaintiffs.
Baldip Singh (*Bachan & Kartar*) for the first defendant.
Ahmad Yani (*Abbas & Ngan*) for the second defendant.
D Gunasegaran for the official receiver.

Cur Adv Vult

Clement Skinner JC: This is the plaintiffs' application made pursuant to s 226(3) Companies Act 1965 ('the Act') for leave of the court to permit the plaintiffs to proceed further with this suit against the first defendant, a company which was wound-up by order of the Ipoh High Court in Companies (Winding-up) No 28–20–1995 on 26 September 1996. This suit has been consolidated with suit GS 22–10–1993 but leave was only being sought in respect of this suit GS 22–261–1992.

The very brief facts of this case are that on 20 October 1987, the plaintiffs entered into a sale and purchase agreement with the first defendant Aik-Aik Holdings Sdn Bhd whereby the first defendant in consideration of the payment of a sum of RM220,000 by the plaintiffs, agreed to sell to them a shoplot known as Block A1-Unit IJ, Aik-Aik Complex; Teluk Intan, Perak. The first defendant was to hand over vacant possession of the said shoplot on or before 20 April 1990 failing which the first defendant was obliged by cl 10(b) of the sale and purchase agreement, to pay damages at 10% of the purchase price calculated from day to day from 20 April 1990. The plaintiffs paid the first defendant a sum of RM80,000 and obtained a loan of RM140,000 from the second defendant to settle the balance of the purchase price. Of this sum, an amount of RM107,000 has been disbursed to the second defendant by the first defendant, leaving a sum of RM33,000 still payable.

It is alleged that the first defendant is in breach of the sale and purchase agreement and has not delivered vacant possession of the said shoplot by the due date by reason whereof the plaintiffs commenced this suit on 30 November 1992 claiming damages against the first defendant for late completion, an injunction to restrain the second defendant from releasing the balance of the purchase price to the first defendant and for an order that on payment of the full purchase price, the plaintiffs are entitled to ownership of the said shoplot.

Some years after the commencement of this suit, the first defendant was on 26 September 1996, ordered to be wound-up in Companies (Winding-up) Petition No 28–20–1985. Section 226(3) of the Act provides that when a winding-up order has been made and a provisional liquidator has been appointed, no action or proceedings shall be proceeded with or commenced against a company except with leave of the court and in accordance with such terms as the court imposes. It is to comply with the above section that the plaintiffs make this application.

The only issue for resolution here is whether this application for leave may be properly made to any High Court including the court in which the suit is pending or it ought to be made to the court that granted the winding-up order. This question arises because the plaintiffs had earlier made a similar application (encl 21) before the learned judge of High Court No 1, Ipoh on 14 December 1998 when the learned judge made no order on the application on the ground that the application for leave ought to be made to the court that made the winding-up order. Instead of doing so, counsel for the plaintiffs instead filed a fresh application to this court, arguing that

such an application may properly be made to this court because the suit is already pending here and eventually if leave is granted, the suit will still need to be heard in this court. Learned counsel submits that the plaintiffs are not interested in the winding-up proceedings and wish to proceed against the first defendant in this court only to pursue their claims in these civil proceedings. Counsel argues that there is no distinction between the court that granted the winding-up order and any other High Court as they both enjoy coordinate jurisdiction.

In my judgement, the application should be made to the court that granted the winding-up order and say so for the following reasons. Firstly, the plaintiffs had already made an application before High Court No 1, Ipoh, for such an order and a decision had been made thereon by the learned judge; if the plaintiffs were dissatisfied with that decision an appeal should have been lodged. Not having done so, it is not open to the plaintiffs to make a similar application before this court. Secondly, I cannot agree with the submission that this court must eventually hear this suit. Rule 163 of the Companies (Winding-up) Rules 1972 empowers the judge who granted the winding-up order 'to order the transfer to him of any action, cause or matter pending brought or continued by or against the company'. Thus, if that judge should see fit to exercise the powers vested in him, this suit will not be heard here as contended for by counsel. Thirdly, the provisions of s 226(3) of the Companies Act should not be read in isolation but together with other provisions of law relevant to the winding-up of a company, of which I regard r 163 of the Winding-up Rules to be one, albeit the Rules constitute subsidiary legislation. When this is done, it will be seen that for the judge who ordered the winding-up to effectively exercise the authority vested in him, if he so wishes, he must in the first place be made aware of the existence of such suits and it is by an application for leave under s 226(3) being made to the judge who ordered the winding-up that the relevant provisions of law are given effect to, although I do accept that there may be other ways in which such a judge may come to know of such pending suits.

For all the above reasons, I make no order on the plaintiffs' application for leave so as to enable them to make the proper application to the court that ordered the winding-up.

Order accordingly.

Reported by Chin En Tek